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COMMUNICATIONS LAS VEGAS, INC.

**UNITED STATES DISTRICT COURT**  
**IN AND FOR THE DISTRICT OF NEVADA**

MICHAEL PHELPS, individually and on  
behalf of all others similarly situated,

Plaintiff(s),

v.

COX COMMUNICATIONS LAS VEGAS,  
INC.,

Defendant.

Case No. 2:11-cv-00801-PMP-LRL

**DEFENDANT COX  
COMMUNICATIONS LAS VEGAS,  
INC.'S MOTION FOR PARTIAL  
RECONSIDERATION OF THIS  
COURT'S ORDER DATED DECEMBER  
22, 2011 [DKT. # 35]**

Defendant Cox Communications Las Vegas, Inc. ("Cox") hereby submits its Motion for Partial Reconsideration of this Court's Order Dated December 22, 2011 [Dkt. # 35]. This Motion is supported by the following memorandum of points and authorities and exhibits thereto, the pleadings and papers on file in this case, and any such further argument as this Court deems necessary.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Cox respectfully requests that this Court reconsider its Order dated December 22, 2011 only  
4 as to its award of attorneys' fees. Cox believes that it had a reasonably objective basis for removal  
5 based on a number of factors and unique circumstances.

6 Most importantly, Cox's sole basis for filing its Petition for Removal was to expedite this  
7 litigation by placing it before the only Court that had ever actually ruled on the sole claim in this  
8 lawsuit – *e.g.*, whether a cable company, such as Cox, is subject to N.R.S. § 608.150. Consistent  
9 with its intent, Cox immediately filed its Motion for Judgment on the Pleadings hoping to dispose of  
10 this case in short order. The congressional intent behind awarding attorneys' fees under the removal  
11 statute, 28 U.S.C. § 1447(c), is to deter delay by the removing party. Based on Cox's actions, it is  
12 clear that the last thing Cox intended was for this case to be delayed or for either party to bear  
13 additional costs. It is unfair to punish Cox where there is no evidence that it intended to delay this  
14 case. It is an injustice to require Cox to pay Phelps's attorneys' fees for trying to expeditiously  
15 dispose of a frivolous claim that should have never been brought in the first place.

16 Second, Cox reasonably believed, based on objective facts, that it could meet the amount in  
17 controversy; otherwise, it would not have attempted removal. District courts within the Ninth  
18 Circuit have found that a complaint which is silent or unclear as to the amount in controversy can be  
19 a basis, in whole or in part, for declining to award attorneys' fees. This is the case here. The Court's  
20 Order states that Cox did not have a reasonable basis for removal based, in part, on Phelps's demand  
21 for \$6,000 to \$9,000 in damages. [Dkt. # 35, Dec. 22, 2011 Order, pp. 6, 9.] But, at the time of  
22 removal, Phelps's complaint was silent as to the amount of damages he sought for unpaid wages.  
23 [See Dkt. # 1, Ex. A, Compl.] It was not until after Cox removed that Phelps advised that he was  
24 seeking "probably about \$6,000 and certainly not greater than \$9,000." [Dkt. #16, p. 3.] Cox did  
25 not have knowledge of this fact at the time of removal, which is when the "objectively reasonable  
26 basis" test is determined.

27 Although attorneys' fees should not have been awarded based on the silent and unclear  
28

1 Complaint alone, Cox had other objectively reasonable bases to remove. At the time of removal,  
2 **Cox looked to its history with the Valdez Lawsuit and determined that it could easily meet the**  
3 **amount in controversy requirement. Valdez and Phelps have the exact same claims because,**  
4 **according to Phelps, Cox's liability for damages includes, via N.R.S. § 608.150, the underlying**  
5 **Fair Labor Standards Act ("FLSA") claim and N.R.S. § 608.018 and N.R.S. § 608.040 claims**  
6 **filed against MC Communications. A comparison of the complaints of Valdez and Phelps**  
7 **reveal they are identical. Valdez made an offer to settle his individual claims against only Cox,**  
8 **exclusive of the other defendants, for \$300,000. Courts consider this evidence of the amount**  
9 **in controversy, and for this reason, Cox clearly had an objectively reasonable basis for**  
10 **removal because Phelps will more likely than not seek the same individual damages as Valdez**  
11 **given they have the same claims against the same defendant.** Cox researched Phelps's wages and  
12 the method of payment by contacting his employer, MC Communications, and determined that his  
13 alleged damages in both actions – including unpaid minimum wages, unpaid overtime, liquidated  
14 damages and allegations of willfulness and attorneys' fees – could be very similar to Valdez.  
15 Valdez's offer of settlement of \$300,000 is more than three times the required amount in controversy  
16 (\$75,000) and does not specify what amount is for damages and what amount is for attorneys' fees.

17 Finally, there is a misunderstanding with respect to Cox's argument as to attorneys' fees.  
18 Phelps's primary argument in his remand motion incorrectly asserted that Cox **could not include**  
19 **any amount of attorneys' fees in its calculation of the amount in controversy at all** because no  
20 statute allegedly applied to class action litigation. In response, Cox merely refuted Phelps's  
21 argument by making the sole point that attorneys' fees could be included in the amount in  
22 controversy. In doing so, Cox pointed generally to *Gibson*, a case Phelps cited. In his Reply brief,  
23 Phelps twisted Cox's argument and accused Cox of rejecting apportionment and misstating *Gibson*.  
24 However, Cox said nothing about apportionment. The only point Cox was trying to make was that it  
25 could include attorneys' fees pursuant to statute in a class action case and that Phelps's interpretation  
26 of the law that it could not do so was incorrect. Cox was concerned about Phelps's trickery when it  
27 first read his Reply brief and should have filed a sur-reply at that time to clarify its position.

For all of these reasons set forth more fully below, Cox respectfully requests that the Court reconsider its December 22, 2011 Order and decline to award attorneys' fees to Phelps.

## **II. PROCEDURAL HISTORY**

It is important to address the Valdez Lawsuit in conjunction with Phelps's lawsuits given that the Valdez Lawsuit contains the exact claims as this action (and the underlying action against MC Communications for which Phelps contends Cox is liable) and is the basis for this removal for all of the reasons set forth herein.

### **A. The Valdez Lawsuit**

On August 18, 2009, Plaintiff's counsel filed the Valdez Lawsuit against Cox for unpaid wages on behalf of their client, Joseph Valdez, under the FLSA, N.R.S. § 608.018, N.R.S. § 608.040, and N.R.S. § 608.150. (*See* Valdez Compl., at Exhibit A hereto; Valdez Am. Compl., at Exhibit B hereto.)

As to the N.R.S. § 608.150 claim, Valdez alleged that he was employed by cable installation companies which contracted with Cox "to install, construct, maintain or modify, various cable television service, computer internet (DSL) service and telephone service installations." (Valdez Compl. ¶¶ 17, 19; Valdez Am. Compl. ¶¶ 17, 19.) Valdez further alleged that the cable installation companies failed to pay him overtime, and alleged that Cox was liable because: "[p]ursuant to Nevada Revised Statutes § 608.150, the defendant, Cox, was acting as a general, or superior contractor, for the plaintiff's installation or construction services by engaging the...subcontractors to perform such installation or construction services and is liable to the plaintiff for all unpaid wages owed for performing such services." (Valdez Compl. ¶ 40; Valdez Am. Compl. ¶ 40.)

N.R.S. § 608.150(1), the statute upon which Valdez relied, provides:

Every original contractor making or taking any contract in this State for the erection, construction, alteration or repair of any building or structure, or other work, shall assume and is liable for the indebtedness for labor incurred by any subcontractor or any contractors acting under, by or for the original contractor in performing any labor, construction or other work included in the subject of the original contract, for labor, and for the requirements imposed by chapters 616A to 617, inclusive, of NRS.

*Id.* (emphasis added). Because Cox is not in the construction business or any other business that

1 would trigger the applicability of N.R.S. § 608.150, Cox successfully moved for summary judgment  
2 on this claim. In dismissing Valdez's N.R.S. § 608.150 claim, this Court stated:

3 **[A] plain reading of the statute entitles Defendant Cox to the relief**  
4 **requested.** NRS § 608.150 is **expressly limited** to original  
5 contractors engaged in the "erection, construction, alteration or repair  
6 of any building or structure, or other work." The record before the  
7 Court does not support a finding that Defendant Cox is engaged in  
8 such a construction business. **The Court will therefore grant**  
9 **Defendant Cox's Motion for Summary Judgment with respect to**  
10 **Plaintiff's claim under NRS § 608.150.**

11 (*See* September 13, 2010 Order, at Exhibit C hereto (emphasis added).)

12 Plaintiff's Counsel then filed a Motion to Certify to the Nevada Supreme Court the question  
13 of who is an "original contractor making or taking any contract in this State for the erection,  
14 construction, alteration or repair of any building or structure, or other work" pursuant to N.R.S.  
15 § 608.150. (*See* Mot. to Certify, at Exhibit D hereto.) This Court denied the motion and effectively  
16 reaffirmed its prior ruling. (*See* November 22, 2010 Order, at Exhibit E hereto).

17 Dissatisfied with this Court's prior two Orders on the N.R.S. § 608.150 issue, Plaintiff's  
18 Counsel forced the parties to brief the issue yet again by filing a frivolous Motion to Reargue on  
19 January 25, 2011. (*See* Mot. to Reargue, at Exhibit F hereto.) The Court denied the Motion to  
20 Reargue, as well, and said: "[t]he Court finds that Plaintiff has not presented a compelling reason  
21 why the Court should reconsider its prior Order, nor has Plaintiff presented new facts or law of a  
22 strongly convincing nature that would support reversing this Court's Order of September 13, 2010."  
23 (*See* June 20, 2011 Order, at Exhibit G hereto.)

24 On November 22, 2011, this Court issued an Order granting Valdez's Motion to Sever and  
25 Remand, ordering that "Plaintiff's second and third causes of action arising under Nevada state law  
26 are hereby SEVERED from the Amended Complaint (Doc. # 17) and REMANDED to the Eighth  
27 Judicial District in and for the County of Clark, State of Nevada in Case No. A-09-597433-C." (*See*  
28 November 22, 2011 Order, at Exhibit H hereto.) Importantly, Valdez's "second and third causes of  
action arising under Nevada state law" – the only claims remanded to Nevada state court – do not

1 include the long-since dismissed N.R.S. § 608.150 claim.<sup>1</sup> This fact did not deter Plaintiff's Counsel  
 2 from filing a "Motion to Reinstate Claims Against Defendant Cox Communications Under N.R.S. §  
 3 608.150" before the District Court for Clark County, Nevada on December 21, 2011. (See "Mot. to  
 4 Reinstate Claims Against Defendant Cox Communications Under N.R.S. § 608.150", at Exhibit I  
 5 hereto.) In his latest filing, Valdez contends that the state court should "reinstate" the N.R.S. §  
 6 608.150 claim against Cox because this Court's ruling was "erroneous as a matter of law" and  
 7 "logically flawed". (See Exhibit I, pp. 5-7.) Thus, Cox will be forced, yet again, to expend time and  
 8 resources in responding to Valdez's fourth attempt to save his N.R.S. § 608.150 claim.

#### 9 B. The Phelps Lawsuit

10 After this Court granted summary judgment on Valdez's N.R.S. § 608.150 claim against Cox  
 11 on September 13, 2010, Plaintiff's Counsel filed the instant lawsuit on February 2, 2011 on behalf of  
 12 Michael Phelps, (and a purported 100-member class) seeking, again, to recover alleged unpaid  
 13 wages from Cox pursuant to N.R.S. § 608.150. [Dkt. # 1, Ex. A, Compl. ¶¶ 4-5, 21-25.] On  
 14 February 11, 2011, Phelps filed a lawsuit against MC Communications asserting claims under the  
 15 FLSA, N.R.S. § 608.018 and N.R.S. § 608.040 [hereinafter, the "MC Lawsuit"].<sup>2</sup> The exact claims  
 16 were alleged in the Valdez Lawsuit. The MC Lawsuit was removed to this Court on March 31,  
 17 2011.<sup>3</sup> Phelps avers that Cox is liable for all of these claims via his N.R.S. § 608.150 claim in this  
 18 lawsuit. [Dkt. #1, Ex. A, ¶¶ 24, 25.]

19 Phelps was not employed by Cox. Instead, Phelps was employed by MC Communications,  
 20 which - exactly like the co-defendants in the Valdez Lawsuit - installs cable on a contract basis for  
 21 Cox. [Dkt. # 1, Ex. A, Compl. ¶¶ 13-16.] Exactly like the Valdez Lawsuit, Phelps alleges in his  
 22

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23 <sup>1</sup> Valdez's second and third causes of action arise under N.R.S. § 608.018 and N.R.S. § 608.040. (See Exhibit B  
 24 hereto, pp. 9-10.)

25 <sup>2</sup> A true and correct copy of the complaint filed in the MC Lawsuit is attached hereto as Exhibit J.

26 <sup>3</sup> The federal action is currently styled: *Michael Phelps v. MC Communications, Inc. et al.*, 2:11-cv-00423-  
 27 PMP-VCF, United States District Court for the District of Nevada. Plaintiff's state law claims arising under N.R.S. §  
 28 608.018 and N.R.S. § 608.040 were remanded on August 1, 2011. That lawsuit is styled: *Michael Phelps v. MC*  
*Communications, Inc. et al.*, Case No. A-11-634965-C, Eighth Judicial District Court in and for the County of Clark,  
 State of Nevada.

1 Complaint that Cox is liable under N.R.S. § 608.150 for MC Communication's failure to pay all  
 2 wages owed under the FLSA. [Dkt. # 1, Ex. A, Compl. ¶¶ 22-23.] Finally, exactly like the Valdez  
 3 Lawsuit, Phelps contends that Cox is liable under N.R.S. § 608.150 because the installation of cable  
 4 in the homes of Cox's customers purportedly amounts to the "alteration" of buildings. [Dkt. # 1, Ex.  
 5 A, Compl. ¶ 22.] In other words, the Valdez Lawsuit and this case raise the same issue of law and  
 6 arise from the exact same allegations of material fact against the same defendant by the same  
 7 Plaintiff's Counsel.<sup>4</sup>

8 Knowing that this action and the Valdez Lawsuit involve identical claims, and that this Court  
 9 had definitively ruled that N.R.S. § 608.150 does not apply to Cox, Cox filed its Petition for  
 10 Removal on May 17, 2011 to secure an early and inexpensive resolution of this case. [Dkt. # 1.]  
 11 Although this Court ultimately ruled that Cox did not meet the amount in controversy requirement  
 12 for removal pursuant to 28 U.S.C. §§ 1332 and 1447, Cox respectfully submits that it should not  
 13 have awarded to Phelps his attorneys' fees pursuant to 28 U.S.C. § 1447(c) because there is  
 14 overwhelming evidence that Cox had a "objectively reasonable" basis for removal for the reasons  
 15 that follow.

### 16 **III. ARGUMENT**

#### 17 **A. Standard for Motion For Reconsideration**

18 A court may relieve a party from a judgment or order pursuant to Fed. R. Civ. P. 60(b) if  
 19 there has been:

20 (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered  
 21 evidence that, with reasonable diligence, could not have been discovered in time to  
 22 move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic  
 23 or extrinsic), misrepresentation, or misconduct by the opposing party; (4) the  
 judgment is void; (5) the judgment has been satisfied, released or discharged; it is  
 based on an earlier judgment that has been reversed or vacated; or applying it  
 prospectively is no longer equitable; or (6) any other reason that justifies relief.

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24 <sup>4</sup> Mr. Greenberg also filed the same lawsuit against Cox on behalf of Plaintiff Brian Izumi the same day that he  
 25 filed this lawsuit on February 2, 2011. In the Izumi Lawsuit, Plaintiff Izumi, like Plaintiff Phelps, contends that Cox is  
 26 liable under N.R.S. § 608.150 for his alleged unpaid wages arising from his employment with Pride Communications,  
 Inc. A true and correct copy of the Complaint in the Izumi Lawsuit is attached hereto as Exhibit K, ¶¶ 24, 25. At the  
 27 same time that it removed this action, Cox also sought to remove the Izumi Lawsuit for the identical reasons it sought to  
 28 remove this action. See *Izumi v. Cox Communications Las Vegas, Inc.*, No. 2:11-cv-00803-RLH-CWH, Dkt. # 24. The  
 Izumi Lawsuit was remanded to state court and no attorneys' fees were awarded. See *Izumi v. Cox Communications Las  
 Vegas, Inc.*, No. 2:11-cv-00803-RLH-CWH, 2011 WL 5854618, \*2 (D. Nev. Nov. 21, 2011).



1 Fed. R. Civ. P. 60(b). *See also Hines v. Neven*, No. 2:11-cv-01481-PMP-GWF, 2011 WL  
 2 6513512, \*1 (D. Nev. Dec. 9, 2011). A motion under Rule 60(b) must be made “within a reasonable  
 3 time,” but no later than one year following entry of the court’s order. Fed. R. Civ. P. 60(c).  
 4 Furthermore, a motion for reconsideration is “generally left to the discretion of the trial court,” and  
 5 the party seeking reconsideration “must set forth facts or law of a strongly convincing nature to  
 6 induce the court to reverse its prior decision.” *Hines v. Neven*, No. 2:11-cv-01481-PMP-GWF,  
 7 2011 WL 6513512, \*1 (D. Nev. Dec. 9, 2011).

8 B. Standard for Awarding Attorneys’ Fees on a Motion to Remand

9 The United States Supreme Court held that “the standard for awarding fees should turn on  
 10 the reasonableness of the removal.” *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005).  
 11 “Absent unusual circumstances, courts may award attorney’s fees under § 1447(c) only where the  
 12 removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an  
 13 objectively reasonable basis exists, fees should be denied.” *Id.* at 141. The Supreme Court further  
 14 stated that “[i]n applying this rule, district courts retain discretion to consider whether unusual  
 15 circumstances warrant a departure from the rule in a given case. For instance, a plaintiff’s delay in  
 16 seeking remand or failure to disclose facts necessary to determine jurisdiction may affect the  
 17 decision to award attorney’s fees.” *Id.* at 141 (emphasis added). *See also Yazzie v. Celadon*  
 18 *Trucking Services, Inc.*, No. CV-09-8198-PHX-GMS, 2010 WL 749639, \*1 (D. Ariz. Mar. 3, 2010)  
 19 (request for attorneys’ fees denied where “[t]he Complaint did not seek a specific dollar amount of  
 20 damages, but rather sought “[f]or judgment in [plaintiffs’] favor in amounts to be proved at trial,  
 21 together with prejudgment interests and costs’ and ‘[f]or such other and further relief that the court  
 22 deems just and proper”).

23 The determination of whether the defendant had an objectively reasonable basis for removal  
 24 is made at the time of removal. *See Martin*, 546 U.S. at 141; *City of San Antonio v. Time Warner*  
 25 *Cable, San Antonio, L.P.*, No. SA-09-CV-869-XR, 2009 WL 4878647, \*4 (W.D. Tex. Dec. 11,  
 26 2009) (“[C]ourts look to the objective merits of the defendant’s case at the time of removal.”) This  
 27 is so because “diversity jurisdiction is determined at the time the action commences.” *Hill v. Blind*  
 28



1 *Indus. & Servs.*, 179 F.3d 754, 757 (9th Cir. 1999). *See also St. Paul Mercury Indemnity Co. v. Red*  
 2 *Cab Co.*, 303 U.S. 283, 294 (1938) (stating that “[i]f the plaintiff could, no matter how bona fide his  
 3 original claim in state court, reduce the amount of his demand to defeat federal jurisdiction the  
 4 defendant’s supposed statutory right of removal would be subject to the plaintiff’s caprice.”)

5 Furthermore, as the Ninth Circuit has recognized, “removal is not objectively unreasonable  
 6 solely because the removing party’s arguments lack merit, or else attorneys’ fees would always be  
 7 awarded whenever remand is granted.” *Lussier v. Dollar Tree Stores, Inc.*, 518 F.3d 1062, 1065 (9th  
 8 Cir. 2008) (holding that “[t]here is no question that Dollar Tree’s arguments were losers” but that is  
 9 not a basis for attorneys’ fees.)

10 C. Cox’s Objectively Reasonable Bases For Removal

11 For all of the reasons set forth below, Cox’s Petition for Removal was objectively reasonable.

12 1. Cox’s Reason for Removal Was to Expedite, Not to Delay, Final Resolution  
 13 of this Case

14 Cox’s motivation for removal – to bring this litigation to a swift conclusion with minimal  
 15 expense – is relevant to the Court’s decision to award attorneys’ fees in granting Plaintiff’s Counter-  
 16 Motion to Remand Case to State Court Because of a Lack of Subject Matter Jurisdiction and for an  
 17 Award of Attorney’s Fees (“Motion to Remand”). In *Martin*, the United States Supreme Court  
 18 discussed the congressional intent behind awarding attorneys’ fees under the removal statute, 28  
 19 U.S.C. § 1447, and stated:

20 Assessing costs and fees on remand reduces the attractiveness of removal as a method  
 21 for delaying litigation and imposing costs on the plaintiff. The appropriate test for  
 22 awarding fees under § 1447(c) should recognize the desire to deter removals sought  
 23 for the purpose of prolonging litigation and imposing costs on the opposing party,  
 while not undermining Congress’ basic decision to afford defendants a right to  
 remove as a general matter, when the statutory criteria are satisfied.

24 *Martin*, 546 U.S. at 140. In *Yazzie v. Celadon Trucking Services, Inc.*, the plaintiff sought attorneys’  
 25 fees associated with his motion to remand “because Defendants demonstrated bad faith when they  
 26 offered no evidence in their Notice of Removal to establish that Plaintiffs’ claims exceeded  
 27 \$75,000.” *Yazzie v. Celadon Trucking Services, Inc.*, No. CV-09-8198-PHX-GMS, 2010 WL

749639, \*2 (D. Ariz. Mar. 3, 2010). Declining to award fees, the Court said:

While Defendants' Notice of Removal cite only "information and belief" as the basis for fixing the amount in controversy in excess of \$75,000, **the lack of explicit evidence does not render their underlying belief objectively unreasonable.** '[R]emoval is not objectively unreasonable solely because the removing party's arguments lack merit, or else attorneys' fees would always be awarded whenever remand is granted.' This is a wrongful death action, and it is not objectively unreasonable to believe that the Plaintiffs would be seeking more than \$75,000 in damages for the death of their son. **Awarding fees and costs under Section 1447(c) can serve to deter spurious removals, orchestrated to prolong litigation and impose costs on the opposing party,** but there is no evidence of improper motive, unreasonable bases for removal, or other 'unusual circumstances.' Accordingly, the Plaintiffs' request for attorneys' fees and costs is denied.

*Id.* at \*2 (emphasis added) (quoting *Lussier*, 518 F.3d at 1065). While this is not a wrongful death case, the same rationale is applied here because there is no evidence of "improper motive" to prolong litigation based on the facts at the time of removal. Based on its history of litigating with Phelps's counsel before this very Court, and this Court's prior ruling on the exact issue raised by Phelps's Complaint, Cox reasonably believed that this Court had the unique ability to expeditiously rule upon the dispositive issue of the applicability of N.R.S. § 608.150 to Cox. Removal would expedite – not delay – the litigation with minimal cost to both parties. As evidenced by the prompt filing of its Motion for Judgment on the Pleadings following removal, Cox sought to obtain an early ruling that, like the plaintiff in the Valdez Lawsuit, Phelps cannot maintain a claim against Cox under N.R.S. § 608.150 because the statute does not apply to Cox. [See Dkt. # 14; Ex. C hereto, p. 2.] Magistrate Judge Hoffman found in the Izumi Lawsuit (which was removed at the same time and involved the exact same claim – N.R.S. § 608.150) that Cox's Motion For Judgment on the Pleadings had "merit" and granted the parties' Motion to Stay Discovery pending a ruling on Plaintiff's Motion to Remand.<sup>5</sup> Accordingly, there is no evidence of delay to warrant an award of attorneys' fees.

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<sup>5</sup> See *Izumi v. Cox Communications Las Vegas, Inc.*, No. 2:11-cv-00803-RLH-CWH, August 31, 2011 Order [Dkt. # 31].

2. Cox's Efforts to Establish the Amount in Controversy Were Objectively Reasonable at the Time of Removal

a. Removal is objectively reasonable if the complaint is silent or unclear as to the amount in controversy

Whether removal is objectively reasonable is determined at the time of removal. *City of San Antonio v. Time Warner Cable, San Antonio, L.P.*, No. SA-09-CV-869-XR, 2009 WL 4878647, \*4 (W.D. Tex. Dec. 11, 2009) (“[C]ourts look to the objective merits of the defendant’s case at the time of removal.”) Where a plaintiff does not specify a specific dollar amount of damages or the amount in controversy is unclear in his complaint, at least three district courts within the Ninth Circuit have deemed removal to be objectively reasonable. In *Jellinek v. Advance Products & Systems, Inc.*, the court refused to award attorneys’ fees, in part, because the plaintiff failed to allege the amount in controversy in the original and amended complaints. No. 10-cv-1226 JM (WMC), 2010 WL 3385998, \*3 (S.D. Cal. Aug. 24, 2010). The court said:

Here, the court denies the motion for award of costs and fees because two of the issues central to the case are unclear. The first ambiguity was the result of the Ninth Circuit’s split in authority on when the 30-day period for filing a notice of removal begins tolling. APS and Forlander should not be held responsible for a split in Ninth Circuit authority. **The second ambiguity was caused by Plaintiff’s failure to allege an amount in controversy in the initial and amended complaints, and given this lack of clarity it cannot be said that defendants lacked an objectively reasonable basis for seeking removal.**

*Id.* at \*3 (emphasis added). Similarly, in *Yazzie v. Celadon Trucking Services, Inc.*, the court declined to award attorneys’ fees where the court found that:

The Complaint did not seek a specific dollar amount of damages, but rather sought ‘[f]or judgment in [plaintiffs’] favor in amounts to be proved at trial, together with prejudgment interests and costs’ and ‘[f]or such other and further relief that the court deems just and proper’.

No. CV-09-8198-PHX-GMS, 2010 WL 749639, \*1 (D. Ariz. Mar. 3, 2010). *See also Chanouzas v. U.S. Bank National Association*, No. CV 09-469 PK, 2009 WL 3734101, \*4 (D. Or. Nov. 3, 2009) (“The defendants, however, did not lack an objectively reasonable basis for seeking removal because the complaint was unclear regarding the total amount in controversy [where it sought \$65,000, and it

1 was unclear as to whether punitive damages and attorneys' fees were included in this amount or if  
 2 they were included in the waiver]. The court should therefore deny plaintiffs' request for attorney  
 3 fees.").

4 Phelps admits in his Motion to Remand that "[t]he amount of such unpaid wages is not  
 5 specified in the complaint." [Dkt. # 17, Mot. to Remand, p. 2.] Here, Phelps's Complaint only  
 6 alleged that, "[a]s a result of the foregoing, the named plaintiff seeks a judgment against the  
 7 defendant Cox for all unpaid wages owed to him and the members of the putative class of plaintiffs  
 8 by MC as alleged in this claim for relief, along with interest, costs and attorney's fees." [Dkt. # 1, Ex.  
 9 A, Compl. ¶ 25; Dkt. # 17, Mot. to Remand, p. 3.] Thus, Cox had a reasonably objective basis for  
 10 removal based on Phelps's Complaint alone because it did not seek a specific dollar amount of  
 11 damages and was unclear regarding the total amount in controversy.<sup>6</sup>

12 b. The \$6,000 to \$9,000 post-removal damages claim cannot be  
 13 considered in determining whether Cox had a reasonable basis for  
 14 removal

15 Whether removal is objectively reasonable for purposes of an award of attorneys' fees is  
 16 assessed at the time of removal and post-removal events are not considered in this analysis.  
 17 *Fernandez v. Pilot Travel Centers, LLC*, No. 5:07-cv-359-Oc-10GRJ, 2007 WL 3379848, \*3 (N.D.  
 18 Fla. Nov. 14, 2007) ("Post removal events normally are not relevant to determining the amount in  
 19 controversy and would be even less relevant to the determination of whether at the time of removal  
 20 the Defendant had an objectively reasonable basis for removing the action."); *City of San Antonio v.*  
 21 *Time Warner Cable, San Antonio, L.P.*, No. SA-09-CV-869-XR, 2009 WL 4878647, \*4 (W.D. Tex.  
 22 Dec. 11, 2009) (emphasis added) ("courts look to the objective merits of the defendant's case at the  
time of removal.")

23 Here, Phelps's assertion that his damages would be \$6,000 to \$9,000 dollars should not have

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24 <sup>6</sup> Compare *Jeld-Wen, Inc. v. CDK Distribution, Inc.*, No. 07-C-342-S, 2007 WL 5674489, \*3 (W.D. Wis. Oct.  
 25 2, 2007) (court awarded attorneys' fees where complaint on its face pled a damages number that was below the required  
 26 \$75,000 amount in controversy) and *Czarnecki v. Hawthorn Manufacturing Corp.*, No. 08-5558, 2009 WL 159806, \*3-4  
 27 (E.D. Pa. Jan. 16, 2009) (court awarded attorneys' fees where complaint specifically sought \$3,278.40 in actual damages  
 28 on wage and hour claim; sought liquidated damages in an amount equal to 25% of the total amount of wages or \$500  
 whichever is greater).

1 been considered in determining whether Cox had an objectively reasonable basis for removal  
 2 because that statement was made for the first time post-removal. In its Order, the Court found that  
 3 Cox's position constitutes an objectively unreasonable basis for removal and that "Defendant has  
 4 failed to present evidence that Plaintiff's individual attorney's fees on a \$9,000 claim would exceed  
 5 \$66,000, thereby satisfying the \$75,000 requirement."<sup>7</sup> [Dkt. # 35, Dec. 22, 2011 Order, p. 9.] The  
 6 Court analogized the instant case to *Rae v. Perry* stating "that the defendant [in *Rae*] lacked an  
 7 objectively reasonable basis for removal when the complaint sought only \$20,000 in damages and  
 8 the defendant failed to offer evidence that showed by a preponderance of the evidence that the  
 9 amount in controversy exceeded \$75,000. 392 F. App'x 753, 756 (11th Cir. 2010)."<sup>8</sup> [Dkt. # 35,  
 10 Dec. 22, 2011 Order, p. 8.] However, Cox was not aware that Phelps was seeking "\$6,000 to  
 11 \$9,000" at the time it made the decision to remove this case. Unlike *Rae*, where the amount in  
 12 controversy was set forth in the complaint, Phelps's Complaint was silent as to the amount in  
 13 controversy and Cox had no knowledge of Phelps's specific claim of \$6,000 to \$9,000 in damages at  
 14 the time of removal. *See Rae v. Perry*, 392 F. App'x 753, 756 (11th Cir. 2010) ("the complaint and  
 15 supporting documentation filed with the notice of removal indicate that *Rae* sought \$20,000 in  
 16 compensatory damages on all counts together"); *Rae v. Perry*, No. 8:09-cv-1549-T-30EAJ, 2009 WL  
 17 3430023, \*2 (M.D. Fla. Oct. 21, 2009) ("In the complaint, Plaintiff seeks compensatory damages in  
 18 excess of \$20,000..."); Dkt. # 1, Ex. A, ¶ 25. Unlike *Rae*, the first time Phelps advised Cox of his

19  
 20 <sup>7</sup> The Court's Order at page 6, footnote 2 states that the "Court does not consider Phelps's post-removal  
 21 stipulation to limit his individual recovery to \$75,000 because facts are determined at the time of removal and generally  
 22 post-removal acts do not oust the court of jurisdiction." This same analysis should be applied to whether removal is  
 objectively reasonable for purposes of an award of attorneys' fees.

23 <sup>8</sup> For purposes of determining whether Cox met the amount in controversy requirement by a preponderance of  
 24 the evidence for removal only (and not attorneys' fees) the Court distinguished *Rile*, *Rivera*, and *Simmons*, the cases  
 25 relied upon by Cox. *Rile v. STRS Ohio CA Real Estate Investment I, LLC*, No. 09-05634, 2010 WL 1838965, \*3 (N.D.  
 26 Cal. May 3, 2010); *Rivera v. Costco Wholesale Corp.*, No. C 08-02202CW, 2008 WL 2740399, \*5 (N.D. Cal. July 11,  
 2008); *Simmons v. PCR Technology*, 209 F. Supp. 2d 1029, 1034-35 (N.D. Cal. 2002). The Court said: "In those three  
 27 cases, the actual damages were significantly higher than Phelps's \$6,000 to 9,000 in unpaid wages (*Rile* - \$11,000 in  
 28 rent, plus relocation costs and medical expenses; *Rivera* - \$52,000; *Simmons* - \$51,200)." [Dkt. # 35, Dec. 22, 2011  
 Order, p. 7.] However, unlike these three cases where the amount of damages or some portions thereof was known at the  
time of removal, Cox did not know that Phelps had at most a \$9,000 wage claim at the time of removal. [See Dkt. # 1,  
 Ex. A, Compl.]

specific amount of damages (*i.e.*, \$6,000 to \$9,000) was after Cox filed its Petition for Removal. [Dkt. # 17, Mot. to Remand, pp. 2, 3.] Therefore, it is fundamentally unfair to find that Cox had an unreasonable basis for removal based on facts that were learned by Cox post removal (*i.e.*, the \$6,000 to \$9,000 claim). For this reason, the award of attorneys' fees should not be based on Phelps's post removal damages claim.

c. The Valdez Lawsuit provided an objectively reasonable basis for determining the amount in controversy at the time of removal where the Complaint was silent and the \$6,000 to \$9,000 post-removal damages claim was unknown to Cox

i. The Valdez settlement offer

Notwithstanding that the silence of Phelps's Complaint as to the amount in controversy demonstrates that Cox had an objectively reasonable basis for removal **at the time it filed its Petition for Removal on May 17, 2011** sufficient to warrant the Court's denial of attorneys' fees, Cox had an additional objectively reasonable basis for its removal – its experience with the Valdez Lawsuit.

The Valdez Lawsuit is highly instructive for purposes of amount in controversy because the claims and damages for which Phelps seeks to hold Cox liable in this lawsuit are exactly the same as the claims and damages sought in the Valdez Lawsuit. In this regard, Phelps's single claim in this lawsuit under N.R.S. § 608.150 seeks to hold Cox liable for the indebtedness of its contractor, MC Communications. [Dkt. # 1, Ex. A, Compl. pp. 5-6.] According to Phelps's Motion to Remand, Cox's alleged liability for MC Communications' "indebtedness" would include the claims and damages sought by Phelps in the MC Lawsuit. [See Dkt. # 17, Mot. to Remand, p. 12.] The claims and damages in the MC Lawsuit include alleged: unpaid minimum wages, unpaid overtime, liquidated damages, attorney's fees, costs and interest. [See Ex. J hereto ¶ 25.]

Indeed, the Valdez Complaint and the Phelps Complaint against MC Communications are the same. In the Valdez Lawsuit, Valdez asserts a claim under the FLSA for which he seeks:

a judgment for unpaid overtime wages and/or unpaid minimum wages, and additional liquidated damages of 100% of any unpaid minimum wages and/or overtime wages, such sums to be determined based upon an accounting of the hours worked by, and wages actually paid to the named plaintiff and any such other persons who consent to join this action, and ... an award of attorney's fees, interest and costs as provided for



by the FLSA.

(See Ex. B hereto, ¶ 27.) Just like the Valdez Complaint, the Complaint filed by Phelps in the MC Lawsuit asserts a claim under the FLSA for which he seeks:

a judgment against all defendants for unpaid overtime wages and/or unpaid minimum wages, and additional liquidated damages of 100% of any unpaid minimum wages and/or overtime wages, such sums to be determined based upon an accounting of the hours worked by, and the wages actually paid to the named plaintiff and any such other persons who consent to join this action, and ... an award of attorney's fees, interest and costs as provided for by the FLSA.

(See Ex. J hereto, ¶ 25.) Valdez asserts a claim under N.R.S. § 608.018 for which he seeks:

a judgment against defendants for overtime wages, such sums to be determined based upon an accounting of the hours worked by, and the wages actually paid to, the plaintiff, and ... an award of attorney's fees, interest and costs, as provided for by Nevada law.

(See Ex. B hereto, ¶ 30.) Phelps asserts a claim under N.R.S. § 608.018 against MC Communications for which he seeks:

a judgment against the corporate defendant for overtime wages, such sums to be determined based upon an accounting of the hours worked by, and wages actually paid to, the plaintiff, and ... an award of attorney's fees, interest and costs, as provided for by Nevada law.

(See Ex. J hereto, ¶ 28.) Valdez asserts a claim under N.R.S. § 608.040 for which he seeks:

a judgment against the defendants ... for the penalty prescribed by Nevada Revised Statutes § 608.040, to wit, for a sum equal to up to thirty days wages, along with interest, costs and attorney's fees, on behalf of himself and the members of the putative plaintiff class.

(See Ex. B hereto, ¶ 36.) Phelps asserts a claim under N.R.S. § 608.040 for which he seeks:

a judgment against the corporate [sic] for the wages owed to them as prescribed by Nevada Revised Statutes § 608.040, to wit, for a sum equal to up to thirty days wages, along with interest, costs and attorney's fees, on behalf of himself and the members of the putative plaintiff class.

(See Ex. J hereto, ¶ 32.) Finally, the N.R.S. § 608.150 claim asserted by Phelps and Valdez is the same. Valdez contends in his complaint:

Pursuant to Nevada Revised Statutes § 608.150 the defendant, COX, was acting as a general, or superior contractor, for the plaintiff's installation or construction services by engaging the defendants VIP, QUALITY, SIERRA AND PARADIGM as subcontractors to perform such installation or construction services and is liable to the plaintiff and the members of the putative class for all unpaid wages owed to them for performing such services.



(See Ex. B hereto, ¶ 40.) In the instant action, Phelps contends that:

Pursuant to Nevada Revised Statutes § 608.150 the defendant, Cox, was acting as an “original” contractor of the services provided by the plaintiff and the putative class members that are alleged in paragraph 22 by engaging MC as its subcontractor or other contractor to perform such services and is liable to the plaintiff and the members of the putative class for all unpaid wages owed to them for performing such services.

[Dkt. # 1, Ex. A, ¶ 24.] Although the Court said in its Order that the Valdez Lawsuit is not analogous because it involved four claims while the Phelps litigation involved one single claim, Cox is liable for the exact same four claims as it was in the Valdez Lawsuit due to the two-tiered nature of the N.R.S. § 608.150 claim. [See Dkt. # 35, Dec. 22, 2011 Order, p. 7.] Phelps confirmed this when he said “[t]he merits of [Plaintiff’s] individual claim against [Cox] should not be determined until such litigation against MC is resolved.” [Dkt. # 17, Mot. to Remand, p. 12.] Therefore, given that identical claims and damages are alleged in both the Valdez Lawsuit and the MC Lawsuit, Cox reasonably relied upon its experience in the Valdez Lawsuit in asserting that the amount in controversy in this action would exceed \$75,000 for Phelps individually.

Significantly, Valdez sought well in excess of \$75,000 for his individual damages just against Cox. Approximately one year after the Valdez Complaint was filed, on August 24, 2010, Mr. Greenberg sent a settlement proposal in the amount of \$300,000 to Cox on behalf of Valdez, individually, and explicitly stated:

I am, at the request of plaintiff Joe Valdez, communicating the following settlement proposal:

A payment to Joe Valdez, individually, of \$300,000 from each defendant, in exchange for a settlement of all claims that he, personally, possesses against the defendants.

The foregoing settlement proposal is made on behalf of Joe Valdez as an individual and is not presented as a proposal for the settlement of the putative class claims or FLSA collective action claims or the claims of any other persons made in this litigation.

(See Declaration of Annette A. Idalski [“Idalski Dec.”], attached as Exhibit L, at ¶ 4 and Ex. 1 thereto.)<sup>9</sup> **The offer of settlement of \$300,000 is more than three times the required amount in**

<sup>9</sup>The same settlement proposal of \$300,000 was made to each of the other three subcontractor defendants of Cox. (See *id.*) In total, from all four defendants, Valdez sought \$1.2 million dollars. (See *id.*)

1 **controversy (\$75,000) and does not breakdown damages and attorneys' fees.**

2 Valdez's settlement demand provides critical evidence and a reasonable basis for removal  
 3 given that the same claims are at issue and based on Cox's research regarding Valdez and Phelps's  
 4 earnings. Phelps is seeking to recover for a longer period of time than Valdez. In this regard,  
 5 Phelps's Complaint against MC Communications was filed on or around February 11, 2011, and  
 6 Phelps's employment with MC Communications terminated in June 2009. (*See* Ex. J hereto; Dkt. #  
 7 1, Ex. C, ¶ 3.) Phelps alleges willful violations of the FLSA, thus allowing for a three year statute of  
 8 limitations, and equaling approximately eighteen (18) months for which Phelps seeks damages  
 9 against MC Communications (from February 11, 2008 through June 2009). (*See* Ex. J hereto, ¶¶ 22,  
 10 24.) In the Valdez Lawsuit, Valdez was employed by Quality for approximately 17 months (from  
 11 January 25, 2006 through March 31, 2007 and again from October 2008 through January 5, 2009).  
 12 (*See* Deposition of Joseph Valdez ["Valdez Dep."] 327:22-328:5; 336:1-7.)<sup>10</sup> Based on a three year  
 13 statute of limitations and the date Valdez filed his complaint (August 18, 2009), Valdez could seek,  
 14 at most, ten and a half months of alleged unpaid wages from Quality. (*See* Exs. A and B hereto.)  
 15 Valdez was employed as an installer by Sierra for only five months (from January 4, 2007 until  
 16 February 2007, and November 2007 through February 4, 2008), and was employed by VIP for only  
 17 six months (from February 2009 through July 2009). (Valdez Dep. 146:19-147:5; 348:22-349:5;  
 18 367:11-16; 368:8-18; 370:8-371:2).

19 Moreover, Valdez and Phelps's average weekly wages were comparable. For example,  
 20 Valdez earned an average of approximately \$607 per week while working for Quality from October  
 21 31, 2008 through January 2009, according to Valdez's pay stubs attached to the Affidavit of Brady  
 22 Wells, Quality's Vice President.<sup>11</sup> Cox researched Phelps's wages by contacting John Wehrman,  
 23 Chief Financial Officer of MC Communications. Mr. Wehrman testified that Phelps earned wages  
 24 amounting to \$474.05 per week on average although this amount fluctuated. [Dkt. # 1, Ex. C, ¶ 4.]

25  
 26 <sup>10</sup> Excerpts from the Deposition of Joseph Valdez are attached hereto as Exhibit M.

27 <sup>11</sup> A true and accurate copy of the Declaration of Brady Wells, with Valdez's paystubs attached as exhibits, is  
 28 attached hereto as Exhibit N.

1           Given the same claims, similar weekly earnings and that Phelps is seeking to recover for a  
 2 longer time period than Valdez, Cox had a reasonable basis to believe that the amount in controversy  
 3 requirement would be met in this case based on Valdez's \$300,000 individual settlement demand.  
 4 Because Valdez failed to break down this \$300,000 offer into damages and attorneys' fees, it is not  
 5 possible for Cox to do so. For removal, Cox need not establish the exact amount in controversy, but  
 6 instead must show that the amount in controversy will, more likely than not, exceed \$75,000.  
 7 *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 701 (9th Cir. 2007). The same must be true as to  
 8 whether the removal was objectively reasonable.

9           "A settlement offer is relevant evidence of the amount in controversy if it appears to reflect a  
 10 reasonable estimate of the plaintiff's claim." *See Cohn v. Petsmart, Inc.*, 281 F.3d 837, 839-40 (9th  
 11 Cir. 2002); *Krajca v. Southland Corp.*, 206 F. Supp. 2d 1079, 1081-82 (D. Nev. 2002) (Pro, J.)  
 12 (citing *Cohn* and holding that amount in controversy requirement was met where settlement letter  
 13 indicated that more than \$75,000 in damages were at issue and where discovery responses revealed  
 14 that the plaintiffs' damages were well in excess of \$75,000); *Arellano v. Home Depot U.S.A., Inc.*,  
 15 245 F. Supp. 2d 1102, 1108 (S.D. Cal. 2003) (stating that "Home Depot relies exclusively upon [the  
 16 plaintiff's] demand letter to establish the amount in controversy" and holding that amount in  
 17 controversy was met where demand letter sought "either \$70,000 and immediate reinstatement, or  
 18 \$95,000 and the 'cleansing' of [the plaintiff's] personnel file"); *Rile v. STRS Ohio CA Real Estate*  
 19 *Investment 1, LLC*, No. 09-05634, 2010 WL 1838965, \*2 (N.D. Cal. May 3, 2010) (pre-removal  
 20 settlement demand of \$75,000 established amount in controversy where the plaintiff's complaint did  
 21 not specify particular amount of damages sought). If this evidence is relevant to amount in  
 22 controversy requirements for removal purposes, it should certainly be sufficient to meet the  
 23 "objectively reasonable basis" standard regarding attorneys' fees awards. While this \$300,000  
 24 settlement offer was made on behalf of Valdez, a non-plaintiff, it is objectively reasonable to  
 25 conclude that the amount in controversy could be met due to the similarity between Valdez and  
 26 Phelps's claims and work history.

27           Indeed, comparisons of fee awards and jury verdicts in similar cases can be the basis for  
 28

1 establishing the amount in controversy. In *Flores v. Standard Ins. Co.*, the defendant argued that  
 2 the amount in controversy was established based, in part, on the punitive damages the plaintiff may  
 3 recover. No. 3:09-cv-00501-LRH-RAM, 2010 WL 185949, \*5-6 (D. Nev. Jan. 15, 2010). Noting  
 4 that the “exact amount [of punitive damages] sought is unclear,” the court stated that “[t]o establish  
 5 the likely amount of punitive damages, the defendant may introduce evidence of jury verdicts in  
 6 cases involving similar facts.” *Id.* at \*5. Based on the defendant’s identification of punitive  
 7 damages awards in similar cases, the court upheld removal. *Id.* at \*6 (“Although the facts of the  
 8 cited cases are not identical to the facts now before the court, the jury verdicts in these cases amply  
 9 demonstrate the potential for large punitive damages awards in bad faith insurance cases.”). *See also*  
 10 *Rivera*, 2010 WL 2740399 at \*4 (holding that the defendant established that the plaintiff’s alleged  
 11 emotional distress and punitive damages could be substantial by introducing evidence of verdicts in  
 12 similar cases). Likewise, in *Simmons v. PCR Technology*, the Court relied on experience with like  
 13 claims to determine that the amount in controversy requirement was met. 209 F. Supp. 2d 1029,  
 14 1035 (N.D. Cal. 2002). Although the court did not reach an exact dollar figure in upholding  
 15 removal, it stated that based on its experience, “attorneys’ fees in individual discrimination cases  
 16 often exceed the damages”. *Id.* at 1035. *See also Brady v. Mercedes-Benz USA, Inc.*, 243 F. Supp.  
 17 2d 1004, 1011 (N.D. Cal. 2002) (holding that the defendant established that the plaintiff’s attorney’s  
 18 fees would meet the amount in controversy requirement by presenting evidence of the hourly rate of  
 19 the plaintiff’s counsel as well as evidence of fee awards in similar cases). For all of these reasons,  
 20 Cox had an objectively reasonable basis for removal based on the Valdez Lawsuit.

21 *ii. A likelihood of substantial attorneys’ fees based on the Valdez*  
 22 *Lawsuit and others*

23 In calculating the amount in controversy for purposes of removal, Cox drew upon its  
 24 experience with Mr. Greenberg, and determined that the attorneys’ fees would be substantial. In the  
 25 Valdez Lawsuit, Valdez’s attorneys’ fees were in the six figure range. (See July 28, 2011  
 26 Declaration of Annette Idalski ¶ 5, a true and correct copy of which is attached hereto as Exhibit O.)  
 27 Similarly, in *David Dent, et al. v. MC Communications, et al.*, Civil Action No. cv-S-04-1197-RCJ-  
 28

1 RJJ, United States District Court for the District of Nevada, a lawsuit filed for unpaid wages after  
 2 Dent had already waived those claims through his settlement via the U.S. Department of Labor, the  
 3 attorneys' fees alleged to have been incurred with respect to Dent individually based on the  
 4 Settlement filed with the Court were \$43,000 even though defendants' motion to dismiss the action  
 5 as to the federal claims was granted.<sup>12</sup> Additionally, based on Cox's research of Plaintiff's  
 6 Counsel's attorneys' fees in similar wage cases, Mr. Greenberg and his co-counsel obtained court-  
 7 approved attorneys' fees of almost a million dollars - *e.g.*, \$923,761. *See* August 25, 2008 Order in  
 8 *Westerfield v. Wyndham Vacation Resorts, Inc.*, Civil Action No. cv-S-05-1264-JCM-PAL, United  
 9 States District Court for the District of Nevada, attached as Exhibit "E" to Cox's Petition for  
 10 Removal.

11 Attorneys' fees would surely be substantial in this case given Cox's recent experience with  
 12 this same claim and Mr. Greenberg in the Valdez Lawsuit. There, the N.R.S. § 608.150 claim failed  
 13 as a matter of law and Mr. Greenberg filed numerous motions seeking to overturn the ruling  
 14 requiring the briefing of at least four separate motions, including but not limited to, a motion to  
 15 reargue, a motion to remand, a motion to certify the issue to the Nevada Supreme Court and, most  
 16 recently as of December 22, 2011, a motion to reinstate the already adjudicated claim in Nevada  
 17 state court. (*See* Exs. D, F, and I hereto.) Because this claim has no merit based on the Valdez  
 18 Lawsuit, Phelps, like Valdez, will likely be the only plaintiff.

19 Given these litigation realities and the unique circumstances present here, it is hard to  
 20 imagine how Cox's reliance on its experience cannot be an objectively reasonable basis for removal.  
 21 Phelps argued and the Court found that Cox could not meet the amount in controversy, in part,  
 22 because attorneys' fees would need to be apportioned among Phelps and the putative class members.  
 23 While this may warrant a remand given the preponderance of the evidence standard, Cox submits  
 24 that this fact does not warrant an attorneys' fees award. As the Ninth Circuit recognized in *Lussier*  
 25 *v. Dollar Tree Stores, Inc.*, "removal is not objectively unreasonable solely because the removing

26 \_\_\_\_\_  
 27 <sup>12</sup> A true and correct copy of the Dent Complaint is attached hereto as Exhibit P. A copy of the Settlement  
 28 Agreement was filed with the Court in the case styled *David Dent, et al. v. MC Communications, et al.*, Civil Action No.  
 cv-S-04-1197-RCJ-RJJ, United States District Court for the District of Nevada, at Dkt. # 59.

1 party's arguments lack merit, or else attorneys' fees would always be awarded whenever remand is  
2 granted." 518 F.3d 1062, 1065 (9th Cir. 2008). "Although no bright line rule emerges, courts that  
3 have applied the *Martin* standard seem to focus upon whether the removing party has offered a  
4 credible reason for the removal, even if it turns out by subsequent events that the removing party was  
5 wrong on the facts or was wrong on the law." See *Fernandez v. Pilot Travel Centers, LLC*, No.  
6 5:07-cv-359-Oc-10GRJ, 2007 WL 3379848, \*2 (M.D. Fla. Nov. 14, 2007)

7 In the same vein, courts have refused to award attorneys' fees based on incorrect calculations  
8 regarding the amount in controversy. In *City of San Antonio v. Time Warner Cable*, the defendant  
9 removed a mandamus action in which no monetary demand was made and even though the  
10 defendant was incorrect in calculating the amount in controversy, attorneys' fees were not awarded.  
11 No. SA-09-CV-869-XR, 2009 WL 4878647, \*2 (W.D. Tex. Dec. 11, 2009). The defendant argued  
12 that, because the City sought to conduct an audit of the defendant's financial records, "the  
13 consequences that may result from the litigation exceed the minimal jurisdictional requirement." *Id.*  
14 In support of its removal, the defendant "included a copy of a Payment Summary Sheet that details  
15 the franchise fees paid to the City from 2006 through 2008," and that "[e]ach franchise payment  
16 alone is in excess of \$75,000." *Id.* The court rejected the defendant's argument, stating that  
17 "[w]hile it is undisputed that TWC has paid millions to the City, those amounts are not the subject of  
18 this controversy. The City is not challenging the validity of those payments nor is it seeking unpaid  
19 taxes or fees. The City merely seeks an audit of financial records in accordance with state law." *Id.*  
20 Although the court found removal to be improper, it refused to award the plaintiff its attorneys' fees  
21 associated with remand, stating that "this Court can see how the Defendants had objectively  
22 reasonable grounds to believe that removal was legally proper based on the amount in controversy".  
23 *Id.* at \*4.

24 Likewise, in *Gregory v. Fidelity Nat. Title Ins. Co.*, the defendant alleged that the amount in  
25 controversy would exceed \$75,000 because the plaintiff was seeking attorneys' fees related to two  
26 separate lawsuits. No. 10-cv-02722-RED-MEH, 2011 WL 3608444, \*2-3 (D. Colo. Aug. 16, 2011).  
27 The court found that state law authorized recovery of attorneys' fees in only one action and did not  
28

1 permit the plaintiff to recover attorneys' fees in the case at bar. *Id.* at \*2. As a result, the court  
 2 stated that the defendant's "calculation improperly considers the plaintiffs' attorney fees in this case  
 3 as part of the amount in controversy" and ordered the case remanded. *Id.* Notwithstanding the  
 4 defendant's improper inclusion of attorneys' fees in calculating the amount in controversy, the court  
 5 declined to award attorneys' fees related to the remand, and stated that "even though the defendant  
 6 ultimately did not satisfy its burden to demonstrate the amount in controversy, I conclude that the  
 7 defendant had an objectively reasonable basis on which to seek removal." *Id.* at \*3.

8 Unlike the defendants in *Yazzie v. Celadon Trucking Services, Inc.*, who simply removed  
 9 based on "information and belief" and submitted no evidence prior to removing the action, Cox had  
 10 an identical case from which to measure the amount in controversy based on a settlement demand,  
 11 had conducted an investigation of Phelps's alleged damages and had direct experience with  
 12 attorneys' fees and damages settlements of Mr. Greenberg. *See Yazzie v. Celadon Trucking*  
 13 *Services, Inc.*, No. CV-09-8198-PHX-GMS, 2010 WL 749639, \*2 (D. Ariz. Mar. 3, 2010). For all  
 14 of these reasons, Cox had an objectively reasonable basis for removal, and, therefore, the attorneys'  
 15 fee award against Cox should be reversed.

### 16 3. Cox Did Not Misrepresent *Gibson*

17 Contrary to Phelps's accusations in his Reply brief in support of his Motion to Remand, Cox  
 18 did not "misrepresent" the *Gibson* case when it said: "attorneys' fees related to the class claims  
 19 asserted in Plaintiff's Complaint are properly included in calculating the amount in controversy."  
 20 [Dkt. # 26, p. 12.] Cox submits that this sentence was taken out of context. A review of Cox's  
 21 Petition for Removal, Phelps's Motion to Remand, Cox's Response to Phelps's Motion to Remand,  
 22 and Phelps's Reply in Support of his Motion to Remand illustrates this point. The parties' argument  
 23 focused solely on whether attorneys' fees could be included in the first place based on a relevant  
 24 statute.

25 **Cox's Argument - Petition For Removal.** Phelps sought attorneys' fees in the Complaint.  
 26 [Dkt. # 1, Ex. A, Compl., ¶ 25.] Not only does Phelps seek attorneys' fees in this action, but he  
 27 contends that Cox is liable for attorneys' fees in the underlying federal court action because Cox is  
 28



allegedly liable for the indebtedness of its subcontractors pursuant to N.R.S. § 608.150. *See* N.R.S. § 608.150; Dkt. # 1, Ex. A, ¶¶ 24-25; Exhibit J hereto, MC Complaint, ¶ 25. In its removal papers, Cox argued that the attorneys' fees pled by Phelps in his Complaint should be included in the amount in controversy. [Dkt. # 1, ¶¶ 13-14.]

**Phelps's Argument - Motion to Remand.** In his Motion to Remand, Phelps vehemently and incorrectly argued that attorney's fees could not be included in the amount in controversy calculation at all even though he sought attorneys' fees in his Complaint. Phelps said:

**2. Because the Plaintiff Does Not Sue Under a Statute Providing For an Award of Attorneys' Fees a Potential Attorney's Fee Award is Not Part of the Amount in Controversy**

...Defendant ignores that *there is no statutory claim for attorney's fees in this case!* The "underlying statute" in this case and the sole basis upon which plaintiff brings suit is N.R.S. § 608.150. That statute does not provide for an award of attorney's fees. A generalized demand in a complaint for attorney's fees, not based upon any express grant of such fees as a matter of statute or contract, is not part of the amount in controversy. *See, Federated Mut. Ins. Co. v. McKinnon Motors*, 329 F.3d 805, n.4 (11<sup>th</sup> Cir. 2003) and cases cited therein. Accordingly, there is no potential attorney's fee award to the plaintiff that can be considered in determining whether the amount in controversy requirement is met.

[Dkt. # 17, Mot. to Remand, pp. 3-4 (emphasis in original).] Phelps further argued:

**3. The Potential Award of Attorney's Fees From A Class Action Recovery is Not Part of the Amount in Controversy for Jurisdictional Purposes**

Defendant asserts that plaintiff's proposed class action under NRCP Rule 23 presents attorney's fee claims that would meet the amount in controversy requirements. That assertion is indisputably false as a matter of law. Potential attorney's fee awards in class actions are not considered in determining whether the amount in controversy requirements are met. *See, Zahn v. International Paper Co.*, 414 U.S. 291 (1973) *Goldberg v. CPC International*, 678 F.2d 1365 (9<sup>th</sup> Cir. 1982) and *Kanter v. Warner-Lambert Co.*, 265 F.3d 853 (9<sup>th</sup> Cir. 2001). Although not applicable, as no such fee award is possible, statutory attorney's fee awards, when made in a class case, are also not properly included in the amount in controversy. *See, also, Gibson v. Chrysler Corp.*, 261 F.3d 927, 942-43 (9<sup>th</sup> Cir. 2001) (Reexamining *Goldberg* and reaffirming that class awards of statutory attorney's fees cannot be attributed to the individual bringing the class case for amount in controversy purposes).

[Dkt. # 17, Mot. to Remand, p. 4.] Both of the points Phelps makes in Sections 2 and 3 of his Motion to Remand are incorrect. Indeed, Phelps alleges that Cox is liable for attorneys' fees under

1 the FLSA in the underlying litigation. Additionally, given Phelps's admission in his Motion to  
 2 Remand that his damages amounted to no more than \$9,000, Phelps could also recover under  
 3 Nevada Revised Statutes § 18.010.<sup>13</sup>

4 **Cox's Argument - Opposition to Phelps's Motion to Remand.** In its Response to Phelps's  
 5 Motion to Remand where Phelps clearly misinterprets the law regarding attorneys' fees in this case,  
 6 Cox sought to correct Phelps's baseless arguments. Cox said in pertinent part:

7 To the contrary, the attorneys' fees related to the class claims asserted in Plaintiff's  
 8 Complaint are properly included in calculating the amount in controversy. *Gibson v.*  
 9 *Chrysler Corp.*, 261 F.3d 927 (9th Cir. 2001). Plaintiff has taken the untenable  
 10 position, both in his Motion to Remand and in his counsel's letters (Exs. 3, 5, 7  
 11 hereto), that "[p]otential attorney's fees awards in class actions are not considered in  
 12 determining whether the amount in controversy requirements are met." [Dkt. #16, p.  
 4]. That is not the law and none of the cases Plaintiff cites supports such a blatant  
 misrepresentation. *Zahn v. Int'l Paper Co.* held that each plaintiff in a class action  
 "must satisfy the jurisdictional amount, and any plaintiff who does not must be  
 dismissed from the case." 414 U.S. 291, 301 (1973).

13 [Dkt. # 26, pp. 12-13.] Therefore, when read in context, Cox was merely pointing out that attorneys'  
 14 fees are properly included in calculating the amount in controversy and that Phelps's statement that  
 15 attorneys' fees must be totally excluded in class actions is wrong. Cox cited to the cases Plaintiff  
 16 relied upon – including *Gibson* – to generally show that attorneys' fees were included in the amount  
 17 in controversy.

18 **Phelps's Argument – Reply to Motion to Remand.** In his Reply, Phelps again misstates the  
 19 law concluding that attorneys' fees under N.R.S. § 18.010 (2)(a) are not recoverable in class actions:

20 The only basis that defendant proffers for a statutory award of attorney's fees in this  
 21 case is N.R.S. § 18.010(2)(a). As discussed, *infra*, such claim is disingenuous and  
 22 absurd as the Nevada Supreme Court has expressly held that attorney's fees cannot be  
 awarded under N.R.S. § 18.010 (2)(a) in class actions. *See, Schouweiler v. Yancey*

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23 <sup>13</sup> This Court agreed with Cox, not Phelps, and stated in its Order:

24 Nevada Revised Statutes § 18.010 authorizes the court to award attorney's fees to a prevailing plaintiff  
 25 that recovers no more than \$20,000. Furthermore, pursuant to § 18.010, attorney's fees can be  
 26 recovered in class actions when recovery does not exceed \$20,000. *See Izumi*, 2011 WL 5854618, at  
 \*2, n.1. Here, Plaintiff seeks \$6,000 to \$9,000, in damages; therefore, if Plaintiff ultimately prevails  
 and recovers \$20,000 or less, the Court may award attorneys' fees under § 18.010.

27 [Dkt. # 35, Dec. 22, 2011 Order, p. 5.]

1 Co., 712 P.2d 786, 788 (Nev. Sup. Ct. 1985).

2 [Dkt. # 29, Reply to Mot. to Remand, p. 4.] Then, Phelps wholly misconstrued Cox's simple  
3 assertion that statutory attorneys' fees can be used to calculate the amount in controversy claiming  
4 that Cox failed to recognize apportionment. Phelps accused Cox of "making a blatant  
5 misrepresentation of the law". [Dkt. # 29, Reply to Mot. to Remand, p. 2.] Phelps said: "Defendant  
6 in this case, exactly like defendant Chrysler in *Gibson*, advances the "sole argument" that a class  
7 award of attorney's fees must be attributed to plaintiff Phelps individually for amount in controversy  
8 purposes. Such argument is not only incorrect, it is abusive, frivolous and made in bad faith in light  
9 of the clear holdings in *Gibson* and *Kanter*." [Dkt. # 29, Reply to Mot. to Remand, p. 6.] However,  
10 this is the perfect example of the "pot calling the kettle black." Phelps incorrectly argued that  
11 attorneys' fees cannot be included in the amount in controversy at all, whether by apportionment or  
12 otherwise, even though he sought attorneys' fees in his Complaint and sought to hold Cox liable for  
13 the attorneys' fees under the FLSA in the MC Lawsuit. [Dkt. # 17, Mot. to Remand, pp. 3-4.] Then,  
14 when Cox argues in response that attorneys' fees can be included, Phelps accuses Cox of  
15 misrepresenting the law by twisting its statement to a reference to apportionment that does not exist.  
16 [Dkt. # 29, Reply to Mot. to Remand, pp. 2-6.] Cox only intended to refute Phelps's argument that  
17 attorneys' fees could not be used to calculate the amount in controversy – nothing more; nothing  
18 less. Cox did not state whether all or a portion of the attorneys' fees should be considered because  
19 this was not the point Cox was making. Cox's point was simply that attorneys' fees should be  
20 included in the amount in controversy.

21 Cox was concerned about Phelps's false accusations against Cox when it first read his Reply  
22 brief at the time it was served. Cox should have filed a sur-reply at that time to clarify its position to  
23 eliminate this confusion. (*See Idalski* Dec. ¶ 5.) Cox respectfully requests that the Court accept  
24 Cox's explanation of this statement as it was intended, and that this misunderstanding should not be  
25 a basis for awarding attorneys' fees.

1 **IV. CONCLUSION**

2 For all of the foregoing reasons, Cox respectfully requests that this Court grant its Motion for  
3 Partial Reconsideration of this Court's Order Dated December 22, 2011 [Dkt. # 35] and deny  
4 Phelps's request for attorneys' fees.

5 DATED: January 4, 2012.

6 CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS  
7 & AUGHTRY

8 By: /s/ Annette A. Idalski  
9 Annette A. Idalski (admitted *pro hac vice* )

10 GORDON & REES

11 By: /s/ Kathleen M. Paustian  
12 Kathleen M. Paustian

13  
14 Attorneys for Defendant COX COMMUNICATIONS  
15 LAS VEGAS, INC.  
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**PROOF OF SERVICE**

I hereby certify that I am a citizen of the United States and am employed in Fulton County, where this mailing occurs. I am over the age of eighteen years and not a party to the within entitled action; my business address is 191 Peachtree Street, N.E., 34th Floor, Atlanta, Georgia 30303. On January 4, 2012, I served the document described as **COX COMMUNICATIONS LAS VEGAS, INC.'S MOTION FOR PARTIAL RECONSIDERATION OF THIS COURT'S ORDER DATED DECEMBER 22, 2011 [DKT. # 35]** on the interested party(ies) in this action as follows:

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**BY MAIL:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Las Vegas, Nevada, in the ordinary course of business.

☐ **BY FEDERAL EXPRESS:** I served said document(s) to be delivered on the same day to a courier or driver authorized by Federal Express to receive documents, in an envelope or package designated by Federal Express.

X **BY ELECTRONIC SERVICE:** I served a true copy, with all exhibits, electronically on designated recipients via electronic transmission of said document(s) as provided under Federal Rules of Civil Procedure.

/s/ Annette A. Idalski  
Annette A. Idalski  
A Partner of CHAMBERLAIN, HRDLICKA,  
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